of whether a carrier is subject to common carrier obligations is a policy judgment left to the sound discretion of the Commission.

Thus, in keeping with the test of common carrier status set forth in NARUC I, the carrier may be legally compelled to provide a service on a common carrier basis if the public interest so requires. *Cable & Wireless* ¶¶ 15; *Virgin Islands Tel.*, 198 F.3d at 924; *Computer II* ¶ 122 (rejecting "any definition of common carriage which is dependent entirely on the intentions of a service provider" and indicating that another consideration must be FCC determination whether "to impose a legal compulsion to serve indifferently"). To evaluate this issue, the FCC has generally focused on the same issue addressed in many of the opening comments: whether the entity in question has market power, especially if this results from its control of a bottleneck facility for which there are a lack of viable common carrier alternatives. *See Cable & Wireless* ¶¶ 15-16; *see also Virgin Islands Tel.*, 198 F.3d at 925; *In re Application of Optel Communications, Inc.*, File No. S-C-L-92-004, Conditional Cable Landing License, 8 F.C.C.R. 2267, ¶ 11 (1993); *In re Domestic Fixed-Satellite Transponder Sales*, 90 F.C.C.2d 1238, ¶ 37 (1982) *aff'd, Wold Communications, Inc. v. FCC*, 735 F.2d 1465 (D.C. Cir. 1984). *See also* NCTA Comments at 15-16 (acknowledging this test but disputing that facts of present inquiry demonstrate that it is met).

Not coincidentally, these are also questions that the Commission considered at length in its *Computer II* decision, in regard to the proper means of achieving its regulatory goal of encouraging the market for enhanced services without regulating it. There, the Commission's recognition of the particular potential for anticompetitive consequences from an enhanced

service provider's control of last-mile transmission facilities was brought to bear on its decision that certain facilities-based carriers should be subject to structural separation requirements and not merely nondiscriminatory provision obligations. *Computer II* ¶¶ 208-221. The same basic concerns demonstrate why here existing cable facility operators should be required to provide nondiscriminatory access to their last mile transmission capabilities.

The Commission's assessment in *Computer II* with respect to basic transmission over telephone wires is absolutely true of cable broadband today: "The importance of the control of local facilities, as well as their location and number, cannot be overstated. As we evolve into more of an information society, the access/bottleneck nature of the telephone local loop will take on greater significance." *Computer II* ¶ 219. The cable last mile is such a local access bottleneck facility for broadband,[22] and indeed with respect to that service, it is more ubiquitous even than telephone wires.[23] Under these circumstances, just as in *Computer II*,

> [a] denial of access . . . by a parent corporation owning basic transmission facilities, may create a bottleneck in the supply of enhanced services – an artificial shortage that could force prices to a supranormal level. Similarly, this artificial 'bottleneck' could produce a tendency to monopoly by forcing competitors of the carrier's separated affiliate to leave the market or by

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[22] *Cf.* AT&T Comments at 20 (conceding that "a cable operator's wires and associated facilities are 'telecommunications facilities' insofar as they are used to provide transmission").

[23] Although POTS is ubiquitous, because of technical limitations based on the length and quality of the loop, not all telephone lines can support DSL transmission. As a result, even in some densely populated areas where upgrading of cable systems to support cable broadband transmission has been undertaken, many customers are not eligible for DSL. *See supra,* Section I.A.

> persuading potential entrants that the extraneous risks of participation are too great. In both cases, the user would be the ultimate victim.

Id. ¶ 208.[24]

3. As a telecommunications service, cable modem service is subject to specific regulatory obligations, from which the FCC should not forbear.

For all the foregoing reasons, as well as those explained by WorldCom and other commenters in opening comments, last-mile cable broadband transmission service is telecommunications service and cable operators providing that service are potentially subject to common carrier regulation.

At the outset, as many commenters observed, it should be made clear that this does not require common carrier regulation of their cable business, or any regulation of the information services themselves that they or their ISP-affiliates may provide. It is fully consistent with the Communications Act and longstanding precedent that a carrier can be a common carrier for some services and not others. *See, e.g.*, *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994); 47 U.S.C. § 153(44) (an entity may be "treated as a common carrier under this

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[24] In *Computer II*, the Commission correctly identified two independent threats arising from the bundling of enhanced services with the use of basic transmission facilities. *See, e.g.*, *Computer II* ¶ 216 (noting that either or both "(1) denial of access to the 'bottleneck,' i.e., local exchange and toll transmission facilities" and "(2) cross-subsidization from the monopoly service to competitive enhanced and CPE markets" can "generally occur where the monopolist perceives a substantial opportunity to extend its power into the adjacent markets"). This risk of denial of access is particularly severe where, as here, one or two facilities operators own a substantial, nationwide network and thus holds the potential of immediate access to a substantial customer base. *See Computer II* ¶ 217 ("A carrier such as AT&T, with a nationwide network of transmission systems, and local distribution plant in major metropolitan areas, could obviously harm a competitor through its control of these facilities in an anti-competitive manner.").

[Act] . . . to the extent it is engaged in providing telecommunications services."). Indeed, Congress plainly foresaw that cable companies might also provide telecommunications services and therefore be treated as common carriers.[25]

In light of this framework, while, as most commenters agree, last-mile cable broadband access to an ISP *can* be regulated as a telecommunications service, the question remains whether the Commission *should* subject this service to regulation. On that point as well, most commenters agree that while the Commission need not subject cable providers to dominant carrier regulation – such as tariffing – it should promptly move to guarantee nondiscriminatory access.

Under section 10 of the Act, the Commission shall forbear from applying any provision of the Act only if enforcement of that provision is not necessary to ensure reasonable and nondiscriminatory charges and practices, or to ensure consumer protection, and is otherwise

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[25] *See* 47 U.S.C. § 541(b)(3)(A) ("If a cable operator or affiliate thereof is engaged in the provision of telecommunications services -- (i) such cable operator or affiliate shall not be required to obtain a franchise under this subchapter for the provision of telecommunications services."); *id.* § 541(d)(2) (discussing state regulation of cable companies' provision of "any communication service other than cable service, whether offered on a common carrier or private contract basis"); *id.* § 522(7) (defining a "cable system" as "a facility . . . that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include . . . a facility of a common carrier which is subject, in whole or in part, to the provisions of [Title II of this Act], except that such facility shall be considered a cable system . . . to the extent such facility is used in the transmission of video programming directly to subscribers") (emphasis added). *See also* H.R. Rep. No. 98-934, at 44 (1984), *reprinted at* 1984 U.S.C.A.A.N. 4655, at 4681 (noting that cable operators may offer a mixture of cable and non-cable services, including other "communications services"); *id.* at 60, *reprinted at* 1984 U.S.C.A.A.N. at 4697 (in passing the 1984 Cable Act, Congress did not mandate that all services offered by a cable company be deemed cable services).

consistent with the public interest. 47 U.S.C. § 160. For the same reasons set out in the preceding section, no universal forbearance is merited: cable operators have not voluntarily offered their broadband transmission on nondiscriminatory terms, and allowing cable operators to discriminate or to foreclose altogether purchase of their last-mile transmission services would not serve the public interest, but would result in harm to the market for information services and thus harm to the public.

Instead, cable operators should be subject to basic nondiscrimination and interconnection requirements insofar as they provide cable broadband transmission capability. These include not only the obligations of sections 201 and 202 of the Act, but also the obligations of local exchange carriers under 47 U.S.C. § 251(a) & (b). *Cf. In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 F.C.C.R. 24011.2, ¶ 40 (1998) (concluding that providers of DSL broadband access to the Internet are local exchange carriers subject to Section 251); WorldCom Comments at 13-14. As WorldCom stated in its opening comments, open access to last mile cable transmission capability is fundamentally a restatement of the central command of section 202, that it is "unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities or services for or in connection with like communication service, . . . or to make or give any undue or unreasonable preference or advantage to any particular person, . . . or to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage." 47 U.S.C. § 202.

Contrary to the implications of some opponents of open access, this nondiscrimination obligation does not strip cable operators of control over their systems. To meet a nondiscrimination obligation, the cable operator must simply make available, on the same terms and conditions, the transmission service that it provides to its own ISP affiliate. This means that the cable operator can still define what type of service it offers. Moreover, since the cable operator is barred only from "unreasonable discrimination," it can still make distinctions among carriers as long as they are justified. Thus, for example, cable operators could certainly maintain limits required to preserve the integrity of their systems, and if capacity is limited, could provide service to select ISPs on a reasonable basis, such as first-come, first-served. Consequently, the requirement of nondiscrimination is fully compatible with the shared nature of cable broadband activity, and can flexibly accommodate whatever technological issues limit the service.

Nor does recognizing nondiscrimination obligations of cable operators deriving market power from their control of last mile broadband transmission facilities require imposing like requirements on all other facilities-based providers of broadband. Despite the suggestions of some commenters that the FCC lacks the power to regulate differently situated carriers differently, it clearly may do so. *See Computer II* ¶ 262 ("our ability to impose and administer different regulatory schemes among a wide variety of carriers under our jurisdiction is similarly without question"). For emergent competitive carriers, especially those using new technologies, it is premature to impose regulation. *See* WorldCom Comments at 7-8. If and when those competitors gain substantial market power, regulation may be merited. Equally likely, if they penetrate markets so as to provide viable alternative means of broadband transmission to and

from the home, and hence lead to real competition between more than two operators, then deregulation generally may be merited, at least in specific geographic markets. At the moment, however, imposition of basic nondiscrimination obligations on cable is needed, and is also most consistent with the regulation of DSL, the other broadband transmission technology with cognizable presence in supporting access to ISPs. [26]

B. The Transmission Capability of Cable Modem Service Is Not Cable Service.

Just as commenters widely agree that cable broadband is a telecommunications service, they agree with WorldCom that the broadband transmission capacity provided by cable modems is not a "cable service" within the meaning of Title VI of the Act. WorldCom Comments at 9-10.[27] This widespread consensus is unsurprising. The statutory category of cable services clearly does not reach the dynamic, interactive uses to which the cable modem broadband

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[26] DSL providers filing comments generally agree that cable operators should be subject to open access regulations, and note that their absence creates a regulatory competitive advantage for cable broadband service over DSL. Nonetheless, as indicated above and in the opening comments of WorldCom, some statutory obligations imposed by the 1996 Act apply only to ILECs, and thus some divergent regulation is statutorily required. WorldCom Comments at 13 n.14. For this reason, SBC & BellSouth's arguments that any Commission decision not to require open access to last-mile cable broadband transmission necessitates ending obligations with respect to DSL and line sharing in particular are unfounded. *See* SBC Comments at 18-23. In any event, they are not a proper subject of this inquiry, especially as far as they challenge whether the high frequency portion of the loop element meets the "impair" standard for UNEs.

[27] Commenters agreeing that cable modem transmission services are not cable services under Title VI include Qwest, SBC & BellSouth, Verizon, Comptel, Utilicom Networks, CenturyTel, Metricom, United States Telecom Association, Earthlink, OpenNet Coalition, Consumer and ISP representatives, New Hampshire ISP Association, Texas Office of Public Utility Counsel, Competitive Access Coalition, Center for Democracy and Technology, United States Internet Association and iAdvance, Progress and Freedom Foundation, Competition Policy Institute, Alliance for Public Technology, and Circuit City Stores.

transmission capacity is put. "Cable service" is defined as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." 47 U.S.C. § 522(6). Cable companies argue that last-mile broadband transmission capability over cable facilities for Internet access meets this definition only by claiming that the ISP services transmitted using this capacity is "other programming service," -- "information that a cable operator makes available to all subscribers generally." 47 U.S.C. § 522(14).[28] *See* AT&T Comments at 12-19; Comcast Comments at 17, NCTA Comments at 6. But Internet services cannot be squeezed into this box. Internet service inherently involves a two-way transmission – *not* one-way transmission, as required in the statutory definition of cable services. Moreover, "subscriber interaction" is the very essence of Internet service and not merely ancillary to a one-way service as required of "cable service." As cable providers acknowledge, consumers using cable modem service can choose a variety of modes of communication, including email and chat rooms, and control their own access to any content on the World Wide Web. *See, e.g.*, AT&T Comments at 22 n.48 (subscribers to AT&T cable Internet service are "free to visit any site accessible over the public Internet"); Cox Comments at 29 ("Cox's cable data services offer end users the same Internet connectivity and applications as ISPs such as Earthlink and AOL"). The cable operator exercises no control over the choice of

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[28] "[V]ideo programming" is defined as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station," 47 U.S.C. § 522(20), and the Commission has correctly concluded that Internet service is not "video programming." *In re Internet Ventures, Inc.*, File No. CSR-5407-L, Memorandum Opinion and Order, 15 F.C.C.R. 3247 (2000).

content thus transmitted.[29] Users choose what statements and queries to transmit from their home computers over the broadband facilities, and individual responses are returned over the same transmission facilities. Such transmission is quintessentially two-way, and for the vast majority of Internet use the cable provider has *no* involvement in – much less "active participation in" – the "selection" of content, as required to meet the definition of cable service. *National Cable Television Ass'n, Inc. v. FCC*, 33 F.3d 66, 71 (D.C. Cir. 1994) (internal citations omitted).[30]

AT&T concedes that many fundamental features of its cable broadband transmission are for this reason not "cable services," and is forced to argue that the two-way, personalized

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[29] In fact, in contrast to the cable and broadcast model, on the Internet, every participant has the possibility of being a content supplier. They need not even make use of an ISP's storage capacity to do so. For example, under peer-to-peer applications, residential consumers use the Internet to exchange content, including music and video, stored by other users on their home computers. The older USENET newsgroup technology similarly allows broad and simple sharing of content.

Moreover, access to some information accessible via the Internet is restricted, and neither the cable facilities operator nor the ISP controls this access. For example, Westlaw, a quintessential information service, may be accessed via a Web interface, using Internet technologies to interact with the Westlaw servers. Only those having a password from Westlaw can make use of this service, but they can do so via any kind of transmission technology connecting them to the Internet, be it cable broadband, DSL or dial up.

[30] The insertion into the 1996 Act of the phrase "or use" did nothing to alter the fundamental statutory requirements that cable service be *one-way* transmission of content selected by the cable operator. Without ignoring the term "one-way" which "or use" qualifies, there is no support for the view that this insertion effected a radical change in the definition of cable service to incorporate the universe of interactive, user-driven applications available over the Internet. Notably, AT&T and Cox, two major cable operators, do not rely on this changed language to argue for the classification of Internet access via broadband cable facilities as a cable service. *See* AT&T Comments at 12. The FCC likewise should not base a fundamental change in regulation on these words.

intercommunication that characterizes the Internet is merely "incidental" to the one-way content provided by an ISP. In its view, the presence of anything that might be labeled as "other programming service" transforms the entire offering of both transmission capacity and any other information service elements into a cable service. *See* AT&T Comments at 19.[31] This claim is untenable. "Other programming service," as its name plainly indicates, refers to other programming that is not video programming, such as channel guides and the like. Internet service is not "programming" at all. Moreover, there is nothing "incidental" about the two-way transmission services customers purchase when they purchase cable modem service. Indeed, although the aspects that AT&T claims make Internet access via broadband cable facilities into a cable service are equally present in Internet access via DSL and via POTS dial-up, AT&T would draw a significant distinction in treatment of fundamentally identical services based on the happenstance that one was provided using a cable system. The statute does not require such an arbitrary distinction.[32]

To stretch the meaning of "cable service" to encompass the two-way exchange of user-driven and user-created content that is the centerpiece of the Internet is not only *not* compelled

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[31] This argument is quite similar to the contamination theory that the Commission has already rejected. *See supra* page 18-19(discussing *Frame Relay Order* ¶¶ 42-45).

[32] Such a distinction would be at odds with the Commission's functional approach to classifying services. Report to Congress, *In re Federal-State Joint Board on Universal Service*, CC Docket No. 98-67, 13 F.C.C.R. 11501, ¶ 86 (1998). As the FCC has stated, "the classification of a provider should not depend on the type of facilities used. A telecommunications service is a telecommunications service regardless of whether it is provided using wireline, wireless, cable, satellite, or some other infrastructure. Its classification depends rather on the nature of the service being offered to customers." *Id.* ¶ 59 (footnote omitted).

by the statute, but is a poor policy choice for the development of broadband, since cable service is subject to divergent regulation by local franchising authorities. Even some advocates of regulatory classification as cable seek to avoid the local regulation that this classification would normally entail. *See, e.g.*, AT&T Comments at 31 (indicating that cable classification would require payment of franchising fees but would not permit local imposition of open cable)[33] Comcast Comments at 40-42 (FCC should preempt state and local regulation of cable broadband); *see also* Cox Comments at 51 (as interstate information service, cable Internet service is exempt from state and local regulation); RCN Telecom Services Comments at 12-13 (FCC should preempt local regulation of cable broadband); Utilicom Networks Comments at 14 (local authorities should not have regulatory authority).[34] A nationwide policy is preferable to encourage the development of cable broadband as well as other advanced services, as the FCC is

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[33] In arguing that local cable franchising authorities regulating Internet access, as a cable service, could not require open access, AT&T relies on statutory sections that prohibit local franchising authorities from regulating telecommunications, in furtherance of the jurisdiction of state and local authorities. *See* AT&T Comments at 31 & nn. 89-90 (citing 47 U.S.C. § 541(b)(3)(D) and 47 U.S.C. § 544(e)). Obviously, then, this argument does not preclude, and even supports, this Commission's ability to require nondiscriminatory offering of cable broadband.

[34] Not surprisingly, the greatest advocates of local regulation of cable broadband transmission are the local franchising authorities in whom this authority would be expected to vest if this is a cable service. *See generally* East Hampton & Southampton, NY Comments; Nat'l League of Cities *et al.* Comments; National Association of Telecommunications Officers and Advisors, *et al.* Comments; Marin County, CA Telecommunications Agency Comments; City of Los Angeles Comments. But even one of those local franchising authorities, while advocating classification as a cable service, advocates the FCC creating a national policy requiring nondiscriminatory open access. *See* City of Los Angeles Comments at 18-19; *see also* National Association of Telecommunications Officers and Advisors, *et al.* Comments at 23-24 (describing local authority as concurrent with that of FCC and indicating that FCC has power "to address artificial restraints upon the development of meaningful competition").

mandated to do under section 706[35]. *See infra; see also* Section 706 (requiring FCC to encourage growth of advanced services, and granting it power to preempt state regulation as necessary to do so).

C. Even If Cable Modem Service Is an Information Service, Regulation to Create Open Access Is Authorized by Law and Merited by Market Conditions.

As indicated above, cable broadband last-mile transmission fits naturally into telecommunications services regulated by Title II of the Act, and that title supports the requirement of nondiscriminatory offering of transmission over the cable operator's own last mile facilities for providers of information services. But that is not the only source of the Commission's authority. The FCC retains ample authority to mandate nondiscriminatory access to this telecommunications capability under both Title I and section 706.

1. The Commission's general powers under Title I support open access.

When confronted with developing technologies, this Commission must at all times keep in mind its fundamental mandate "to make available . . . to all the people of the United States, . . . a rapid, efficient nationwide and world-wide wire and radio communications service with adequate facilities at reasonable charges." 47 U.S.C. § 151. In support of this goal, as well as the specific provisions found elsewhere in the Act, "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). "The principal limitation upon, and guide for, the exercise of these additional powers which Congress has

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[35] Pub.L. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, *codified at* 47 U.S.C. § 157 (notes) ("Section 706").

imparted to this agency is that Commission regulation must be directed at protecting or promoting a statutory purpose." *Computer II* ¶ 126. Requiring facilities-based providers of Internet access via cable facilities to offer that broadband transmission capability on a nondiscriminatory basis fulfills at least two such purposes.

First, nondiscriminatory access regulation protects the market for telecommunications services purchased by upstream backbone ISPs. Without open access, cable providers can exert their tying influence not only on end users, but also on those ISPs with whom they choose to do business, steering them to purchase transmission capability underlying backbone services from telecommunications providers affiliated with the cable operator, or from backbone providers who themselves are customers of the cable operator's telecommunications affiliates. (This is a particular risk with AT&T, which is a major provider of transmission for backbone providers.) The prospect of this type of tying poses a critical threat to the backbone ISP market and to the underlying transport market, both of which are currently competitive. In this context, when cable operators act on their incentive to bundle their last mile transmission facilities with a particular backbone provider, they not only harm the market for information services by backbone providers, but will ultimately harm the competitive market for regulated telecommunications services sold to those providers.

Second, open access regulation also protects the FCC's jurisdiction over Title II telecommunications services such as DSL. As almost all commenters, including cable facilities operators, acknowledge, the only presently available widespread alternative broadband alternative to cable is DSL, which this Commission has correctly determined is a

telecommunications service. The absence of regulation of cable broadband permits the cable operators unfairly to undercut the prices of DSL providers, or otherwise undermine competition until they drive DSL providers from the market. Just as the FCC initially regulated cable television in support of its mandated regulation of broadcast television, so too may it regulate cable broadband transmission to preserve fair competition with DSL. *See United States v. Midwest Video Corp.*, 406 U.S. 649, 659-70 (1972); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172-78 (1968).

2. The Commission's Section 706 authority to promote advanced services also supports cable open access.

Finally, the 1996 Communications Act specifically charges the Commission with encouraging the deployment to all Americans of advanced telecommunications *capability*, which is "defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video communications using any technology." Section 706(a), (c)(1). "[C]onsistent with the public interest, convenience, and necessity," the Commission may implement measures to promote such advanced telecommunications capability and encourage competition. Section 706(a).

Cable broadband service fits squarely within the category of advanced services. *Accord* AT&T Comments at 29. As indicated above, the public interest supports open access to cable broadband service, which will plainly enhance competition in last mile transmission, broadband transmission, and broadband content. Consequently, section 706 provides additional support for

the FCC's requirement of nondiscriminatory access to last mile broadband transmission over cable systems.

Thus, even outside of its Title II powers, the FCC can and should require nondiscriminatory access to cable broadband.

III. Commission Regulation Mandating Open Access Would be Constitutional.

The cable operators' comments to the contrary notwithstanding, the First Amendment does not limit the Commission's authority to mandate open access. As the Supreme Court explained in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 657 (1994) (*Turner I*): "The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas." *Turner* itself squarely held that cable systems can be regulated consistent with the First Amendment because cable operators had physical control of a critical pathway of communication between broadcast stations and viewers, since once they chose cable, the cable operator had bottleneck control over what they viewed. *Id.* at 656. The exact same thing is true as it applies to cable operators' control over last-mile access to cable modem services.

A. Open Access Would Not Violate the Compelled Speech Doctrine.

Contrary to the cable operators' assertions, a nondiscrimination requirement would not be an invalid form of compelled speech under *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). Regulations requiring business property to be used for other people's speech implicate the First Amendment compelled speech doctrine only in rare instances. First, the

doctrine is applicable only if the property owner objects to what is being said on political or ideological grounds. *See Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997). But cable operators have no ideological or political objection to the nature of the services that would be provided by a multiplicity of ISPs. Their objection to open access is strictly commercial, and so raises no First Amendment concern.

Second, the First Amendment is not offended here because this is not a circumstance in which the views of others might be attributed to the cable operator. *Glickman*, 521 U.S. at 471. Views expressed in speech delivered by an unaffiliated ISP will not "be identified with those of the" cable operator. *See PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980) (rejecting a shopping center owner's challenge to a law requiring it to permit others to exercise speech rights within the center because their views were unlikely to be attributed to the owner). Cable subscribers would only receive speech from an unaffiliated ISP by *separately choosing and contracting with that ISP*, and would only receive speech from a web site through an unaffiliated ISP by personally accessing that web site. Moreover, subscribers would be reminded of the true sources by the logos that appear on their screens whenever they access their ISPs or web sites. In addition, though it is hardly necessary to do so, a cable operator could further dissociate itself from speech provided by unaffiliated ISPs with monthly reminders in its bills. *See Turner I*, 512 U.S. at 655.[36]

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[36] Some cable operators note in this regard that in *Comcast Cablevision of Broward County, Inc. v. Broward County,* No. 99-CV-6934, 2000 U.S. Dist. LEXIS 16485 (S.D. Fla. Nov. 8, 2000), a district court reached the contrary conclusion. But that court's analysis was fundamentally flawed. It looked exclusively to whether cable operators had traditionally served as conduits for Internet services as the only factor that might alert subscribers that the source of the content they

B. Open Access Does Not Unconstitutionally Limit Cable Operator's Speech.

Open cable modem access also would not impose unconstitutional burdens on positive speech rights, because it would not reduce the number of channels cable operators may use to provide programming of their choice. Once a cable operator has chosen to offer ISP access, and set aside bandwidth for that purpose, the operator can provide subscribers with access to their chosen ISPs through that same bandwidth, using standard routing and addressing methods to deliver data packets to the appropriate ISP and subscriber. Thus, a nondiscrimination rule would not prevent a cable operator from offering any content it wishes and therefore does not interfere with the operator's editorial discretion – only with its ability to reap monopoly profits from tying access services with ISP services.[37]

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receive from their ISP is not their cable operator, without recognizing that subscribers necessarily know the source of such content because they receive unaffiliated ISP services only if they select and contract with the ISPs themselves, and they receive content from a website only by affirmatively accessing it. In addition to its misunderstanding regarding the likelihood that Internet content would be erroneously attributed to the cable provider, the court disregarded the Supreme Court holdings in both *Turner I* and *Glickman* that an *economic* preference to limit access does not raise First Amendment concerns at all, and is entirely different from the concerns raised in cases like *Tornillo* where ideological and political considerations were implicated. 512 U.S. at 655. The court also failed to follow *Turner I*'s holding that cable systems operate as a bottleneck once subscribers choose cable as their access method. *Id.* at 656. Finally, the court misapplied First Amendment tax cases to conclude that *any* singling out of a particular medium is subject to strict scrutiny, without recognizing that *Turner I* itself made clear that this is not the constitutional rule. *Id.* at 657.

[37] Although the degree of cable modem use in a particular neighborhood can affect the speed at which the data is transmitted, that effect is wholly unrelated to the number or identity of ISPs serving those subscribers. Numerous users consuming excessive bandwidth, *e.g.*, by downloading video programming, can degrade the service of nearby users *in exactly the same way* whether all are served by one ISP or by numerous different ISPs. *See* CDT Comments, Att. at 58 ("The need to impose some constraints on bandwidth usage . . . is independent of the third party access question.").

But, even if an open access rule is viewed as burdening cable operators, it would easily survive First Amendment scrutiny. Under *United States v. O'Brien*, 391 U.S. 367 (1968), a regulation is valid if the government's interest is important, unrelated to the suppression of free expression, and its regulatory choice does not burden substantially more speech than needed to further the government's goals. *See Turner I*, 512 U.S. at 662. The government's interest in ensuring open access to ISPs from cable modems serves the important interest of encouraging competition among ISPs, leading to lower prices, innovative services, and service to lower-margin customers. It also helps prevent a single or a handful of ISPs from using control over public access to the Internet to steer subscribers to particular speakers, or away from others, by slowing transmission from certain speakers or blocking access to them altogether. *See* CDT Comments, Att. at 62; CU Comments at 9-10. These interests are not merely unrelated to *suppressing* free expression; they are interests in *promoting* free expression. "[A]ssuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment." *Turner I*, 512 U.S. at 663.

There is also no doubt that a nondiscrimination rule would further the government's interests because it would provide cable modem customers with a choice of ISPs, rather than one ISP attempting to serve the largest possible share of the market.

A nondiscrimination rule also passes muster under the final prong of the *O'Brien* test because it "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Turner I*, 512 U.S. at 662. The only alternative suggested in the submitted comments is for the government to do nothing, allowing cable operators to act on their

incentive to abuse their last-mile monopoly facilities to the detriment of the public. The government may properly reject this alternative as likely to be less effective in achieving its goals.

C. An Open Access Rule Would Not Constitute a "Taking" of Cable Operators' Property.

Finally, there can be no concern that a nondiscrimination rule would violate the Takings Clause. There is no physical taking because the rule merely regulates the terms on which cable operators may engage in the access services business. It is their choice whether to do so. *See FCC v. Florida Power Corp.*, 480 U.S. 245, 251-53 (1987); *Yee v. City of Escondido*, 503 U.S. 519, 531-32 (1992). There is no regulatory taking because cable operators remain free to charge subscribers for access services and to charge ISPs for any equipment or services they supply for interconnection. The Takings Clause does not prohibit regulation of industries to ensure fair play when companies receive fair value for anything they choose to provide. *See, e.g., Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

Conclusion

For all of the forgoing reasons, the Commission should mandate that cable operators provide nondiscriminatory access to broadband transmission provided over last-mile cable facilities.

Respectfully submitted,

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Dated: January 10, 2001

CERTIFICATE OF SERVICE

I, Elena N. Broder-Feldman, hereby certify that on this 10th day of January 2001, I caused a true copy of Comments of WorldCom, Inc. to be served by hand delivery or U.S. mail on the parties listed below:

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